ONE HUNDRED SEVENTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON THE JUDICIARY

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September 17, 2002

The Honorable Daniel J. Bryant
Assistant Attorney General
Office of Legislative Affairs
U.S. Department of Justice
9th and Pennsylvania Avenues, NW
Washington, DC 20530

Dear Mr. Assistant Attorney General:

Thank you for your September 13, 2002 response to my August 23, 2002 letter regarding whether the U.S. Department of Justice may have given misleading information to Congress. More specifically, my letter detailed the Department's attempt to cover-up a major court ruling. I now am concerned that your most recent letter further distorts the record.

In our June 13, 2002 letter, the Committee asked how many Foreign Intelligence Surveillance Act ("FISA") certifications were made under the "significant purpose" standard that could not have been made under the previous standard of "the purpose." As an initial matter, it defies explanation that any complete and forthcoming answer to this question would omit completely any discussion of the Foreign Intelligence Surveillance Court's May 17, 2002 opinion. This opinion apparently was the only time the court had ruled against the Department in its over twenty years of existence. Unfortunately, the lower court ruling was released only as a result of the efforts of the court and not the Department. That is why your July answer was, at best, misleading.

Furthermore, your July 26, 2002 response states that the number of FISA search and surveillance authorizations increased because the Foreign Intelligence Surveillance Court has demonstrated a:

> "tolerance of increased law enforcement investigations and activity connected to, and coordinated with, related intelligence investigations in which FISA is being used. Given the courts' approach in this area, the 'significant purpose' amendment has the potential for helping the government to coordinate its intelligence and law enforcement efforts to protect the United States from foreign spies and terrorists."

Your answer makes it appear that the court authorized FISA searches and surveillance knowing that the Department was coordinating its law enforcement and intelligence gathering efforts. The court's May 17, 2002 opinion is quite to the contrary. The court said the Department has illegally (1) misrepresented facts in FISA applications so it could conduct criminal investigations using the lax FISA standards and (2) allowed criminal attorneys and investigators to direct intelligence gathering requests so the information could be used for criminal cases.

In making its decision, the court referred to disclosures by the Federal Bureau of Investigation to it in March and September 2002 that it had breached the wall between criminal and intelligence investigations. The FBI (1) had agents working on both sides of a case, (2) lied to the court in applications by saying certain FISA targets were not under criminal investigation when they were, and (3) lied about material facts in other applications.

As a result, the court is requiring, *inter alia*, that the FBI, DOJ Criminal Division, and DOJ Office of Intelligence Policy and Review coordinate investigations of foreign attacks, terrorism, or intelligence activities. They also can consult to ensure the long-term intelligence and criminal interests of the United States are protected. At the same time, "law enforcement officials shall not make any recommendations to intelligence officials regarding the initiation, operation, continuation, or expansion of FISA searches or surveillance." Finally, the FBI and Criminal Division must ensure that law enforcement officials do not direct or control the use of FISA to enhance criminal prosecution, either intentionally or inadvertently.

It is clear from that opinion that the court, contrary to your July response, was not aware of the level of coordination the Department was engaging in between its law enforcement and intelligence gathering arms. In responding to my question about this misrepresentation, your September 13 letter describes coordination as having two parts, advice giving and information sharing. You further state the court did accept your views on information sharing and that aspect of coordination was the focus of the July response. Your July 26 letter makes no similar distinction; instead, it makes it appear as if the court knowingly has allowed coordination of both types. In essence, you now are saying the original response contains a distinction that it never before had.

Frankly, I am now even more troubled that the Department has utterly failed to take responsibility for this serious misrepresentation to the U.S. Congress. I urge you to make a full accounting of this matter in a written response to me at the earliest possible moment.

Sincerely,

John Conyers, Jr.
Ranking Member

cc: The Honorable F. James Sensenbrenner, Jr.
Chairman
U.S. House Committee on the Judiciary